

1 B. The Petitioner(s) were the Complainants below, in PUC Docket DR 26/UC 600
2 dismissed by Order 11-504. Petitioners were intervening parties to the administrative proceeding
3 UT-125 which produced the PUC orders for refunds denied by DR 26/UC 600. Petitioners were
4 the successful appellants in *Northwest Public Communications Council v. Public Utility*
5 *Commission of Oregon*, 100 P.3d 776, 196 Or.App. 94 (Or.App. 11/10/2004).

6 2.

7 The parties to the appeal are:

8	Petitioners	Respondent
9	THE NORTHWEST PUBLIC	State of Oregon through its Agency the Public
10	COMMUNICATIONS COUNCIL, PSPs A to	Utility Commission and its Commissioners in
11	Z; and on behalf of its members Central	their Official Capacity
12	Telephone et al.	Respondent
13		Oregon Public Utilities Commission and
14		Stephen M. Bloom, Susan Ackerman and John
15		Savage, in their capacity as Commissioners
16		Respondent
17		Qwest Corporation (Intervenor at the PUC)

16 3.

17 The names, bar numbers, addresses, and telephone numbers of the respective attorneys for
18 the parties as currently known to the Petitioner are:

19	Frank G. Patrick, OSB 760228	John R. Kroger, OSB 077207
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5 **Attorney for Respondent,**
6 **Qwest Corporation**

Attorney for Respondent,
State of Oregon - PUC

7 4.

8 Petitioners designate the record in its entirety being unable at this time to stipulate that the
9 agency record may be shortened.

10 5.

11 Petitioners further advise the court that in consideration of the recent dismissal by
12 Commissioner James Nass' letter of June 16, 2010, of a similar Petition in a Court of Appeals
13 Case No. A143692, that Petitioner has pending Marion County Circuit Court Case No.
14 02C144425 awaiting an amendment to include this relief if so ordered.

15 6.

16 This appeal is timely and otherwise properly before the Court of Appeals because it is
17 being filed within 60 days of the effective date of the PUC final Order 11-504 entered on
18 December 15, 2011.

19 February 10, 2012

/s/ Frank G. Patrick

Frank G. Patrick, Attorney for Appellant
OSB 760228

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served a copy of the foregoing Petition for Review upon:

3 Public Utility Commission Of Oregon
4 550 Capitol Street NE, Suite 215
5 PO Box 2148
6 Salem, OR 97308-2148
7 **Respondent**

8 John R. Kroger, OSB 077207
9 Attorney General of the State of Oregon
10 Anna Joyce, OSB 013112
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16 **Attorney for Respondent, PUC**

17 PERKINS COIE LLP
18 Lawrence H. Reichman, OSB No. 860836
19 1120 N.W. Couch Street, Tenth Floor
20 Portland, OR 97209-4128

21 LReichman@perkinscoie.com
22 **Attorney for Respondent QWEST**

23 I further certify that said copy was placed in a sealed envelope addressed to said attorney's last
24 known address as shown above and deposited in the United States Mail at Portland, Oregon, and
25 that the postage thereon was prepaid.

26 February 10, 2012

/s/ Frank G. Patrick

Frank G. Patrick, Attorney for Appellant
OSB 760228

27 **CERTIFICATE OF FILING**

28 I certify that within the time required I Filed this Petition for Review on February _10_, 2012,
29 by mailing certified or E-Filing using the Court system, the Original to:

30 **ATTN: Records Section**
31 State Court Administrator
32 Supreme Court Building
33 1163 State Street
34 Salem, OR 97301-2563

35 February 10, 2012

/s/ Frank G. Patrick

Frank G. Patrick, Attorney for Appellant
OSB 76022

ORDER NO. 11 504

ENTERED DEC 15 2011

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR 26/UC 600

THE NORTHWEST PUBLIC
COMMUNICATIONS COUNCIL, on behalf
of PSPs A to Z, and NPCC MEMBERS:
Central Telephone, Inc.; *et al.*,

Complainants,

v.

QWEST CORPORATION,

Defendant.

ORDER

DISPOSITION: MOTION FOR SUMMARY JUDGMENT GRANTED;
COMPLAINT DISMISSED; DOCKET CLOSED

I. INTRODUCTION

In this docket, the Northwest Public Communications Council (NPCC) asserts that Qwest Corporation is liable for refunds under an order issued by the Federal Communications Commission's Common Carrier Bureau known as the *Waiver Order*. We conclude the refund obligation created in the *Waiver Order* was not triggered in this case because Qwest did not rely on the waiver granted in that order. We therefore grant the motion for summary judgment filed by Qwest on April 30, 2010, dismiss NPCC's complaint, and close this docket.

II. BACKGROUND

NPCC is a regional trade organization that represents companies providing public payphone services. These companies are known as payphone service providers (PSPs). Some of NPCC's members purchase payphone services from Qwest. Qwest is a regional Bell operating company (RBOC) that owned almost 80 percent of the payphone lines in Oregon until it sold its payphone services business in 2004.

On May 14, 2001, NPCC filed a complaint against Qwest, initiating this docket. NPCC alleges that Qwest's rates for public access line (PAL) services were excessive.

NPCC claims that its members are entitled to a refund for paying rates that did not comply with the “new services test” (NST), as required by a series of Federal Communication Commission (FCC) orders implementing Section 276 of the Telecommunications Act of 1996. NPCC asserts only one legal basis for its refund claim—an order issued by the FCC’s Common Barrier Bureau known as the *Waiver Order*.¹

Section 276 of the Telecommunications Act of 1996 was enacted to “promote competition among PSPs, and promote the widespread deployment of payphone service to the benefit of the general public.”² To advance these goals, Congress directed the FCC to prescribe regulations preventing the RBOCs from subsidizing or discriminating in favor of their own payphone service. Section 276(b) requires the FCC to meet five specific requirements, including “prescribing a set of non-structural safeguards for BOC payphone service * * * equal to those adopted in the Computer Inquiry III proceeding.”³

The FCC implemented Section 276 in a series of orders.⁴ The *First Payphone Order*, released September 30, 1996, addresses the five statutory requirements in Section 276(b). That decision requires that “in order to receive compensation for completed calls originating from its payphones, a LEC [local exchange carrier] PSP must be able to certify that it has complied with several requirements, including the institution of “effective intrastate tariffs reflecting the removal of charges that recover the costs of payphones and any intrastate [payphone] subsidies.”⁵ To implement the nonstructural safeguards requirement of Section 276(b)(1)(C), the FCC held that LECs must unbundle payphone line services and file tariffs using the “new services test” (NST).⁶ The FCC concluded that LEC PSPs could begin receiving dial-around compensation (DAC) for the

¹ NPCC attempted to amend its complaint twice. First, NPCC sought to add specific named plaintiffs and to include claims related to Qwest’s “CustomNet” service. The Commission allowed NPCC to add named plaintiffs, but did not allow NPCC to include the CustomNet claims because those claims were time barred. Order No. 09-155 (May 4, 2009). Second, NPCC attempted to again add CustomNet claims and to add claims related to the Commission’s decisions in Docket UT 125. The Commission again denied NPCC’s motion to amend the complaint. Order No. 10-027 (Feb 1, 2010).

² 47 USC § 276(b).

³ *New England Public Communications Council, Inc., v. FCC, et al.*, 334 F.3d 69, 71 (DC Cir 2003); see also, *In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, CC Docket No. 90-623, Report and Order, 6 FCC Rcd 7571 (Dec 20, 1991).

⁴ *In the Matter of the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, First Report and Order, 11 FCC Rcd 20541 (Sept 20, 1996) (*First Payphone Order*); Order on Reconsideration, 11 FCC Rcd 21233 (Nov 8, 1996) (*Payphone Reconsideration Order*), aff’d in part and remanded in part, *Illinois Pub. Telecomms. Ass’n v. FCC*, 117 F3d 555 (DC Cir 1997); Second Report and Order, 13 FCC Rcd 1778 (Oct 9, 1997) (*Second Payphone Order*), vacated and remanded, *MCI Telecomms. Corp. v. FCC*, 143 F3d 606 (DC Cir 1998); Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (Feb 4, 1999) (*Third Payphone Order*), aff’d, *American Pub. Communications Counsel v. FCC*, 215 F3d 51 (DC Cir 2000). The *First Payphone Order* and the *Payphone Reconsideration Order* are collectively referred to as the *Payphone Orders*.

⁵ *Payphone Reconsideration Order*, ¶ 131.

⁶ *Id.*, ¶ 199; see also *In the Matter of Wisconsin Pub. Serv. Comm’n*, Order Directing Filings, Bureau/CPD No. 00-01, FCC 02-25 (rel.Jan 31, 2000), ¶ 12.

use of their payphones if intrastate payphone tariffs complying with the requirements of the *First Payphone Order* were in effect by April 15, 1997. Qwest was both an RBOC and a LEC PSP.

On November 8, 1996, the FCC released its *Payphone Reconsideration Order*, modifying certain requirements for LEC tariffing of payphone services and unbundled network functions. The FCC clarified that the states, not the FCC, would review the LEC's intrastate payphone tariffs. The states were directed to ensure that intrastate payphone service tariffs are cost-based, consistent with the requirements of Section 276, nondiscriminatory, and in compliance with the Computer Inquiry III tariffing guidelines (meaning NST-compliant).⁷ The *Payphone Reconsideration Order* acknowledged that, in those cases where a LEC had already filed intrastate payphone tariffs, the state could conclude that the LEC's existing tariffs complied with the requirements of the *Payphone Orders*, in which case no further filings would be required. LECs that did not have intrastate payphone tariffs in compliance with the *Payphone Orders* were directed to file tariffs with the states no later than January 15, 1997. Rates were to be effective by April 15, 1997.⁸

Qwest filed new tariffs for public access line (PAL) service with the Public Utility Commission of Oregon (Commission) on January 15, 1997. Qwest stated that the tariffs were intended to meet the requirements in the *Payphone Orders*, including the requirement in the *Payphone Reconsideration Order* that intrastate PAL rate filings must comply with the NST.

The Commission considered and approved Qwest's new intrastate PAL rates at its April 1, 1997 Public Meeting. A Staff report presented at the public meeting reiterated that the filing was intended to meet the requirements established by the FCC in the *Payphone Orders*. The Commission-approved PAL rates became effective on April 15, 1997.⁹ No party appealed the Commission's approval of Qwest's PAL rates.

On April 15, 1997, the FCC's Common Carrier Bureau adopted and released its *Waiver Order*.¹⁰ The *Waiver Order* granted a request by a coalition of RBOCs, including Qwest, to extend the time to file intrastate tariffs for payphone services:

Because some LEC intrastate tariffs for payphone services are not in full compliance with the [FCC's] guidelines, we grant all LECs a limited waiver until May 19, 1997 to file intrastate tariffs for payphone services consistent with the "new services" test, pursuant to the federal guidelines established in the Order on Reconsideration, subject to the

⁷ *New England Pub. Communications Council, Inc. v. FCC*, 334 F3d at 72.

⁸ *Payphone Reconsideration Order*, ¶ 163.

⁹ The transcript of the April 1, 1997 Commission public meeting does not indicate that NPCC entered an appearance or submitted comments regarding Qwest's proposed PAL rates. See Declaration of Lawrence Reichman in Support of Qwest's Motion for Summary Judgment, Ex. 3 (Apr 30, 2010) ("Reichman Decl.").

¹⁰ *In the Matter of Implementation of the Pay Telephone Reclassification Provisions of the Telecommunications Act of 1996*, DA 97-805. 12 FCC Rcd 21370 (1997) (*Waiver Order*).

terms discussed herein. This waiver enables LECs to file intrastate tariffs consistent with the “new services” test of the federal guidelines detailed in the Order on Reconsideration and the Bureau Waiver Order, including cost support data, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order and remain eligible to receive payphone compensation as of April 15, 1997, as long as they are in compliance with all of the other requirements set forth in the Order on Reconsideration. Under the terms of this limited waiver, a LEC must have in place intrastate tariffs for payphone services that are effective by April 15, 1997. The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration and this Order become effective. *A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed* other requirements with which the LECs must comply before receiving compensation.¹¹

Qwest took no action in response to the *Waiver Order* in Oregon because it believed that the rates approved by the Commission effective April 15, 1997, complied with all of the FCC’s requirements.

During this period, Qwest had a general rate proceeding, Docket UT 125, pending before the Commission. As part of that case, NPCC argued that Qwest’s PAL rates were not NST compliant. The Commission approved new PAL rates in 2001, and NPCC appealed. The Oregon Court of Appeals held that the Commission did not appropriately evaluate whether the PAL rates were NST compliant.¹² While the appeal was pending, Qwest filed new PAL rates in March 2003. In 2007, NPCC stipulated that the March 2003 rates were NST compliant. The stipulation was approved by the Commission in Order No. 07-497.

In its complaint, NPCC asserts that Qwest’s Oregon intrastate PAL tariffs were not NST compliant until 2007. NPCC further claims that because Qwest did not file NST-compliant Oregon intrastate PAL tariffs within the 45-day waiver period specified by the *Waiver Order*, but nevertheless began collecting DAC effective April 15, 1997, Qwest is subject to the refund requirement set forth in the *Waiver Order*. According to NPCC, the applicable refund period extends from April 15, 1997, until the Commission finally approved NST-compliant PAL rates in 2007 in Docket UT 125.

III. QWEST’S MOTION FOR SUMMARY JUDGMENT

Qwest filed a motion for summary judgment in these proceedings on April 30, 2010. Qwest makes two arguments. First, Qwest claims that it did not rely on the FCC’s

¹¹ *Id.*, ¶ 2 (footnotes omitted) (emphasis added).

¹² *NPCC v. Pub. Util. Comm’n of Oregon*, 196 Or App 94, 100 P3d 776 (2004).

Waiver Order in Oregon, and therefore the order's refund obligation was never triggered. Second, Qwest argues that the refund obligation was limited, ending on May 19, 1997, and therefore a claim for refunds needed to be filed by May 19, 1999, or the claim is barred by the applicable two-year statute of limitations. Because NPCC's complaint was not filed until May 21, 2001, Qwest asserts that it is entitled to summary judgment because NPCC's claims are time barred.

As explained further below, we can resolve Qwest's motion based solely the question of whether Qwest "relied on" the *Waiver Order*. We therefore do not discuss Qwest's second argument.

A. Applicable Legal Standard

Summary judgment is appropriate where there is no genuine issue of material fact and, based on those facts, the moving party is entitled to a judgment as a matter of law.¹³ In determining whether this standard has been met, we must review the record in the light most favorable to the party opposing summary judgment.¹⁴

B. Parties' Arguments

1. Qwest

Qwest argues that it did not rely on the waiver in Oregon, so the refund obligation was never triggered. According to Qwest, the *Waiver Order* "imposes a refund obligation only on a LEC 'who seeks to rely on the waiver granted in' the order."¹⁵ Qwest asserts that the *Waiver Order* gave LECs two options: (1) LECs could review existing tariffs and decide that those tariffs complied with the FCC's requirements, including the NST, in which case no further filings would be required; or (2) LECs could decide that existing tariffs are not NST compliant, in which case they would be required to file new tariffs by May 19, 1997. Qwest argues that a refund obligation was created only if the LEC filed new tariffs between April 4, 1997, and May 19, 1997, and the rates in the newly filed tariffs were higher than those in the existing tariffs. Qwest contends that the refund obligation in the *Waiver Order* should be construed narrowly because it was volunteered by the LECs when they requested the waiver.

Qwest states that, in Oregon, Qwest filed new payphone rates on January 15, 1997, in compliance with the *Payphone Orders*. Qwest believed that these rates complied with all of the FCC's requirements. Those rates were approved by the Commission on April 1, 1997, and were effective April 15, 1997. When it became clear that the NST applied to existing services as well as new services, the RBOCs requested the waiver ultimately

¹³ ORCP 47 C. See *Jones v. General Motors Corp.*, 325 Or 404 (1997); *Seeborg v. General Motors Corp.*, 284 Or 695 (1978); *In the Matter of the Petition of Metro One Telecommunications, Inc., for Enforcement of an Interconnection Agreement with Qwest Corporation*, Docket No. IC 1, Order No. 02-126 at 2 (Feb 28, 2002); *City of Portland v. Portland General Electric Co.*, Docket No. UM 1262, Order No. 06-636 at 1-2 (Nov 17, 2006). (citing Order No. 02-126 at 2).

¹⁴ *Id.*

¹⁵ Qwest's Memorandum in Support of Motion for Summary Judgment at 17 (Apr 30, 2010).

granted in the *Waiver Order*, and Qwest reviewed all of its state tariffs to determine compliance with the NST. In Oregon, Qwest decided that its January 15, 1997 tariff complied with the NST and no further filings were required, and Qwest did not file new tariffs between April 4, 1997, and May 19, 1997. Thus, according to Qwest, it did not rely on the waiver granted in the *Waiver Order* and no refund obligation was triggered.

Qwest further states that the FCC required only that a LEC be able to certify that it had tariffs that complied with the applicable requirements in effect by April 15, 1997, and did not require that those tariffs be reviewed and approved as NST compliant by that date. If a LEC certified compliance with the FCC requirements, including NST compliance, as of April 15, 1997, then the FCC authorized the LEC to collect DAC as of that date.

Qwest asserts that its interpretation of the *Waiver Order* is consistent with the only reported case to address a refund claim under the order: *In the Matter of Independent Payphone Assoc. of New York, Inc., v. Pub. Serv. Comm'n of the State of New York*, 5 AD 3d 960, 774 NYS2d 197 (2004) (“*IPANY*”). In that case, the New York appellate court concluded that Verizon was not required to refund portions of its PAL rates because Verizon did not rely upon the *Waiver Order*, even if the rates Verizon relied upon in 1997 to comply with the FCC’s *Payphone Orders* were later determined not to comply with the NST.

2. NPCC

NPCC makes two arguments in response to Qwest.¹⁶ First, NPCC argues that Qwest relied on the waiver order by collecting DAC as of April 15, 1997, even though Qwest did not have NST-compliant rates in effect on that date. NPCC claims that it was conclusively decided in *NPCC v. Pub. Util. Comm'n of Oregon* that Qwest’s PAL rates from April 15, 1997, through November 15, 2007, were not NST-compliant. According to NPCC, because Qwest did not have NST-compliant rates in effect as of April 15, 1997, but started collecting DAC on that date, Qwest necessarily relied on the FCC’s *Waiver Order* and is liable for refunds. NPCC interprets the *Waiver Order* as requiring rates that have been reviewed and approved as NST compliant by April 15, 1997; it is not sufficient to simply have rates that were filed and effective as of that date.

Second, NPCC asserts that Qwest is judicially estopped from disputing its refund obligation because it benefitted from the FCC’s waiver. NPCC states that Qwest, as one of the RBOCs requesting the waiver of the tariff filing deadline, told the FCC that it would provide refunds if it relied on the waiver granted in the *Waiver Order* and NST-compliant rates were greater than the rates in effect as of April 15, 1997, so Qwest cannot now argue that it is not liable for those refunds.

¹⁶ NPCC also inexplicably argues that this Commission does not have subject matter jurisdiction over its claims and states that it is pursuing its claims in federal court. The federal court has since dismissed NPCC’s claims, rejecting NPCC’s argument that the Commission does not have subject matter jurisdiction. Because NPCC invoked this Commission’s jurisdiction when it filed its complaint, the correct process is for NPCC to withdraw its complaint without prejudice if it now believes that it chose the wrong forum.

C. Resolution

As NPCC acknowledges, the only “claim in [this] case is the claim for refund under the Waiver Order[.]”¹⁷ Thus the key question is whether the *Waiver Order* applies.

Under the *Payphone Orders*, LECs like Qwest were required to file payphone tariffs with state commissions that met certain requirements. The FCC ordered an April 15, 1997 effective date for the tariffs. If a LEC had a state tariff in effect as of April 15, 1997, that met all of the FCC’s requirements, including compliance with the NST, then the LEC could begin collecting DAC from PSPs as of that date.¹⁸ Because of a misunderstanding about the application of the NST to existing payphone services, the RBOC LECs requested additional time to ensure that their state tariffs complied with the NST.¹⁹ This request was granted in the *Waiver Order*, which allowed LECs to begin collecting DAC from PSPs on April 15, 1997, even if the LEC’s state payphone tariff did not comply with the NST.²⁰ To take advantage of this extension, a LEC must have a payphone tariff in place, effective as of April 15, 1997, that complied with all of the other requirements of the *Payphone Orders*. The extension gave the LECs an additional 45 days (from April 4, 1997) to file NST-compliant tariffs (by May 19, 1997). To remedy any inequity caused by allowing LECs to recover DAC before NST-compliant rates were in effect, the FCC required LECs to refund the difference between the rates in effect on April 15, 1997, and “newly filed” tariff rates.²¹

The *Waiver Order* made it clear that the right to DAC was determined on a state-by-state basis, and failure to meet the FCC requirements in one state did not affect the right to compensation in a state where the requirements had been met. Thus, it is irrelevant if Qwest relied on the waiver granted in the *Waiver Order* in other states. The only question is whether Qwest relied on the waiver in Oregon.

We agree with Qwest that it is clear from the plain language of the *Waiver Order* that the refund obligation is triggered only if a LEC relied on the waiver to comply with the FCC requirements. The order states:

A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide a credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates.²²

If a LEC certified that the tariffs in effect by April 15, 1997, met all of the FCC requirements, including the NST, then the LEC met the original filing deadline and did not rely on the waiver of that deadline. In Oregon, Qwest filed an intrastate payphone

¹⁷ NPCC’s Memorandum in Opposition to Qwest Motion for Summary Judgment at 1 (Jul 29, 2010).

¹⁸ *Waiver Order*, ¶¶ 6, 7, 10.

¹⁹ *Id.*, ¶ 14.

²⁰ *Id.*, ¶ 2.

²¹ *Id.*, ¶ 20.

²² *Id.*, ¶ 25.

tariff on January 15, 1997, that was intended to meet all of the FCC requirements. The Commission approved the tariff on April 1, 1997, and the tariff was effective April 15, 1997.²³ Qwest did not file another payphone tariff between April 4, 1997, and May 19, 1997.²⁴ Instead, Qwest certified on May 20, 1997, that the tariff in effect in Oregon on April 15, 1997, met all of the FCC requirements.²⁵ Qwest therefore did not avail itself of the extension granted in the *Waiver Order*.

NPCC acknowledges that Qwest did not file a new payphone tariff between April 4, 1997, and May 19, 1997, but argues that Qwest nonetheless “relied on” the *Waiver Order* because the rates in effect on April 15, 1997, did not actually comply with the NST, so Qwest was collecting DAC in Oregon even though its tariff did not comply with the requirements of the *Payphone Orders*. NPCC claims that the Oregon Court of Appeals conclusively determined that Qwest’s PAL rates as of April 15, 1997, did not comply with the NST. Thus, according to NPCC, the refund obligation was triggered and Qwest owes refunds from April 15, 1997, until NST-compliant rates were filed, reviewed, and approved.

We are not persuaded by NPCC’s arguments. Contrary to NPCC’s assertions, the *Waiver Order* did not require that intrastate payphone tariffs be reviewed and conclusively determined to be NST compliant by May 19, 1997. The order required only that LECs be able to certify that it had effective state tariffs that met the FCC requirements. Qwest made such a certification on May 20, 1997. Nothing in the *Waiver Order* indicates that the FCC required tariffs to be filed, reviewed, approved, and all appeals exhausted before the requirements of the *Payphone Orders* would be deemed satisfied. Furthermore, in *NPCC v. Pub. Util. Comm’n of Oregon*, the Court of Appeals found that the Commission did not appropriately evaluate whether the PAL rates adopted in 2001 in Docket UT 125 complied with the NST. The court did not conclusively determine that Qwest’s PAL rates as of April 15, 1997, were not NST compliant. Qwest’s 1997 PAL rates were never appealed and have never been declared (by the Court of Appeals or this Commission) to be inconsistent with the NST.

NPCC’s position is also contrary to the only reported decision involving a similar request for refunds of PAL rates under the *Waiver Order*. In *IPANY*, Verizon filed an intrastate payphone tariff on January 15, 1997, to be effective April 15, 1997. Although Verizon was also one of the RBOCs that requested the waiver granted in the *Waiver Order*, Verizon did not file another payphone tariff between April 4, 1997, and May 19, 1997, in New York. Instead, Verizon (like Qwest in this case) relied on the previously filed tariff, believing it to be NST compliant. The New York commission’s determination that those rates were NST compliant was appealed, and the PSPs asserted the right to a refund under the *Waiver Order*. The trial court concluded that the PSPs were entitled to a refund. The New York appellate court disagreed:

²³Declaration of Alex M. Duarte in Support of Qwest’s Motion for Summary Judgment, Ex. 2 (Apr 30, 2010).

²⁴*Id.* at 1.

²⁵Reichman Decl., Ex. 5.

The basis for the Supreme Court's conclusion was a letter from representatives of Verizon's predecessor requesting an extension of time in which to review existing rates and file new rates if it were determined that the existing rates were not compliant with the new services test, proposing an agreement to refund or provide a credit to PSPs for the difference if the newly filed rates were lower than existing rates and requesting an order of the [FCC] granting a 45-day extension for filing new rates and ordering a refund in the event such new rates were indeed lower than existing rates. Suffice to say that new rates were not filed and the refund order was thus never effective. The fact that the PSC's prior approval of the preexisting rates has now been judicially called into question and the matter has been remanded for further consideration cannot be the basis of potential refunds that were only agreed to and contemplated for a period ending May 19, 1997.²⁶

NPCC did not address *IPANY* in its response to Qwest's motion. We agree with the court's reasoning, and conclude that Qwest did not rely on the waiver granted in the *Waiver Order*, and thus the refund obligation was never triggered.

NPCC's second argument – judicial estoppel – is dependent upon the conclusion that Qwest relied on the waiver order. Because we conclude that Qwest did not rely on the order in Oregon, we find that NPCC's judicial estoppel argument is meritless.

VI. CONCLUSION

We conclude that Qwest did not rely on the *Waiver Order* in Oregon, and therefore the refund obligation established in that order was never triggered. Because the *Waiver Order* is NPCC's only asserted basis for Qwest's refund liability, NPCC's complaint fails to state a cause of action as a matter of law. We therefore grant Qwest's motion for summary judgment and dismiss NPCC's complaint.

²⁶ See *IPANY*, 5 AD 3d at 963-964. The referenced letter is the RBOC's request for a waiver, which was granted in the *Waiver Order* as discussed above. See Reichman Decl., Ex. 1.

VII. ORDER

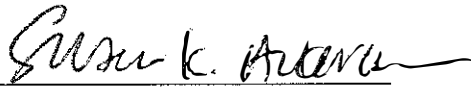
IT IS ORDERED that:

1. Qwest Corporation's motion for summary judgment is granted.
2. Northwest Public Communications Council's complaint is dismissed with prejudice.
3. This docket is closed.


Made, entered, and effective DEC 15 2011



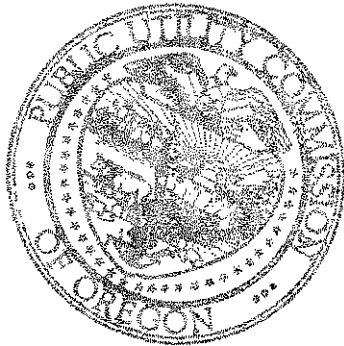
John Savage
Commissioner



Susan K. Ackerman
Commissioner



Stephen M. Bloom
Commissioner



A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR 26/UC 600

THE NORTHWEST PUBLIC COMMUNICATIONS
COUNCIL, on behalf of PSPs A to Z, and NPCC
MEMBERS: Central Telephone, Inc.; Communication
Management Services, LLC; Davel Communications,
a/k/a Phonetel Technologies, Inc.; Interwest Tel, LLC;
Interwest Telecom Services Corporation; NSC
Communications Public Services Corporation; National
Payphone Services, LLC; Pacific Northwest Payphones;
Partners in Communication; T & C Management, LLC;
Corban Technologies, Inc.; and Valley Pay Phones, Inc.,

Complainants,

v.

QWEST CORPORATION,

Defendant.

ORDER

**DISPOSITION: MOTION TO STRIKE FIRST AMENDED COMPLAINT
GRANTED IN PART AND DENIED IN PART; MOTION
TO ALLOW SECOND AMENDMENT TO THE
COMPLAINT DENIED; PLAINTIFFS TO FILE AMENDED
COMPLAINT CONSISTENT WITH ORDER**

I. INTRODUCTION

In this Order, we grant, in part, the Qwest Corporation (Qwest) Motion to Strike First Amended Complaint and, in its entirety, the Qwest Motion to Strike Second Amended Complaint. We deny the Motion to Allow Second Amendment to the Complaint filed by the Northwest Public Communications Council (NPCC).

II. PROCEDURAL HISTORY

In Order No. 09-155, entered May 4, 2009, we granted in part and denied in part NPCC's February 26, 2009, Motion for Leave to Amend Complaint and Amended Complaint

(Motion). We denied the portion of the Motion seeking to add new claims against Qwest. The claims NPCC sought to add were for refunds relating to Qwest's provision of "CustomNet" fraud prevention services. We found that granting the request to add the new claims would have: (1) joined claims not sufficiently related to the subject matter of the initial complaint--Public Access Line (PAL) service--to relate back to it, and (2) violated the statute of limitation provisions applicable to the new claims that NPCC proposes to add to this proceeding.

We granted the February 26, 2009, Motion to the extent that we allowed the addition of 13 new plaintiffs. In that Motion, and in the NPCC Reply to Qwest's opposing pleading, NPCC asserted that there would be no change in the claims asserted or the discovery process and that discovery, claims, and damages theories would be the same. The parties proposed to be added by the amendment were the parties with the pecuniary interest in the original complaint, and the amendment served to clarify the true parties with a pecuniary interest in and knowledge of the transactions that were the subject of the complaint. Those parties, not NPCC, had the knowledge and the records, and NPCC had been acting throughout this litigation on their behalf. They would be the ones cross-examined.¹ Therefore, we concluded that Qwest was not prejudiced by their inclusion as parties-plaintiff. NPCC did not request that we reconsider our decision; neither did it appeal our Order, which therefore became final on July 6, 2009.

After substitution of counsel on July 22, 2009, and several subsequent extensions of time in which to file an amended complaint, on November 16, 2009, NPCC simultaneously filed a First Amended Complaint and a Second Amended Complaint and Precautionary Motion to Allow Amendment.²

On December 8, 2009, Qwest filed a Motion to Strike First Amended Complaint and a supporting Declaration of Lawrence Reichman (Reichman Declaration) and a Motion to Strike Second Amended Complaint and Response to Complainants' Precautionary Motion to Allow Second Amendment to the Complaint.

On December 22, 2009, NPCC filed a Reply (NPCC Reply) and Memorandum in Support of NPCC Complainants Reply to Qwest Motions to Strike (Reply Memorandum) and supporting Declarations of Charles W. Jones (Jones Declaration) and Frank G. Patrick (Patrick Declaration).

III. DISCUSSION

A. NPCC First and Second Amended Complaints

The First Amended Complaint asks the Commission to order Qwest to pay refunds for "payphone services overcharges" collected by Qwest since April 15, 1997, or approximately 13 years ago. These services include: (1) PAL, and (2) services under various

¹ Order No. 09-155 at 3, 5-6, 8.

² On November 13, 2009, NPCC filed a Complaint for Declaratory Relief and Damages in the United States District Court for the District of Oregon, essentially requesting relief similar to that requested in the complaints filed with the Commission on November 16, 2009.

names such as Fraud Protection, CustomNet, Selective Class of Call Screening or Originating Line Screening, which were referred to in Order No. 09-155, alternatively and collectively, as “CustomNet.” Pursuant to Ordering Clause 2 of Order No. 09-155, NPCC now lists the additional Complainants in Exhibit A to the First Amended Complaint.

The bulk of the First Amendment is a detailed history of the litigation and the actions and inactions of federal and state agencies. NPCC asserts that the outcome of docket UT 125 was a finding that Qwest’s Payphone Services rates did not comply with the new services test and Section 276 of the Telecommunications Act of 1996.³ NPCC contends that the purpose of this Amendment is to join the Payphone Service Providers (PSP) as named Complainants and “conform the Complaint to the evidence developed in the Docket UT-125 proceeding and the developments in the law that have occurred since NPCC filed the original complaint in May of 2001.” NPCC asks the Commission to issue an order that Qwest: (1) make refunds for payphone services rates to the extent that they exceeded lawful rates under Section 276 and the new services test since April 15, 1997; (2) refund to the complainants the amount by which Qwest’s Payphone Services rates exceeded the legal rates; and (3) calculate those refunds based on the amount by which the rates charged since April 15, 1997, exceeded the Payphone Services rates established in the final order in docket UT 125.⁴

The Second Amended Complaint asserts that it represents “Unidentified Payphone Service Providers A to Z” as well as the NPCC member companies whose interests NPCC had previously represented who “purchase or have purchased Payphone Services from Qwest in Oregon.” As in the First Amended Complaint, the subject services are both PAL and CustomNet services, “as well as those services which were the subject of the OPUC Rate Case UT-125.” NPCC asserts that it will act on behalf of the “Unidentified Payphone Service Providers A to Z” in a “representative” capacity.⁵ The remainder of the Second Amended Complaint largely repeats the First Amended Complaint but claims that the purpose is also “to assert claims arising from the same series of original transactions and related actions that led to the filing of the original Complaint and to take additional evidence as Ordered by the Marion County Circuit Court, if necessary to show that the Complaint of the Complainants is not and was not made moot by the OPUC orders 01-810 and 02-009 in UT-125.”⁶ NPCC also alleges that Qwest made material representations and promises to the FCC and the Commission when it requested a waiver of the rules and that, due to Complainants’ reliance on the representations and promises, “Qwest is estopped from denying their obligation to pay the Federal Refund to Plaintiffs” for the difference between the compliant and non-compliant tariffs during the April 15, 1997, to November 15, 2007, period.⁷

In addition to asking the Commission to issue an order that Qwest make refunds as set forth in the First Amended Complaint, the Second Amended Complaint seeks refunds, based upon the differences between the charged and final rates for the period between April 15, 1997, and November 15, 2007, when the stipulated order establishing final rates in UT 125 was

³ First Amended Complaint at 5-7.

⁴ *Id.* at 8-9.

⁵ Second Amended Complaint at 2-3.

⁶ *Id.* at 12-13.

⁷ *Id.* at 14-15.

entered, the award of damages for “discrimination and preferential treatment of its own Payphone Services and those of any third party,” interest at the highest rate allowed by law, and attorneys’ fees both before the Commission and the Oregon circuit and appellate courts.⁸

B. Qwest’s Motions to Strike First and Second Amended Complaints

Qwest contends that the First Amended Complaint doesn’t comply with Order No. 09-155 because the First Amended Complaint “clearly continues to include a claim for refund of CustomNet charges, which are expressly included within the operative term ‘Payphone Services’ in the First Amended Complaint” and, giving no excuse for failure to comply with the order, should therefore be stricken.⁹ Qwest contends that any assertion that NPCC’s members are not bound by Order No. 09-155 and are thus permitted to file a claim for refund of CustomNet services notwithstanding the Commission’s decision is without merit for several reasons. First, NPCC has consistently purported to act exclusively on behalf of its members and asked that its members, not itself, be paid, filing the amendment to add its members only to “remove the distraction of [Qwest’s] spurious defense” with respect to the issue of its standing. Second, Qwest asserts that the claim is time-barred and that points of law relating to recovery for alleged overcharges for CustomNet Services may not be relitigated or reconsidered after having been decided at an earlier stage of the same case. This principle applies whether or not the NPCC members were represented by NPCC at the time the Commission issued its decision. Third, regardless of the issue of standing, “The Order was solidly based on Ninth Circuit precedent directly on point” and there is no reason to believe that the Commission would reach a different conclusion because of a change in the status of the complainant. Finally, Qwest asserts, when the individual complainants received permission from the Commission to become parties to the case, they did not seek or obtain leave from the Commission to include CustomNet Services in their complaint.¹⁰

Qwest asks the Commission to strike the Second Amended Complaint because it was filed without leave of the Commission as required by Oregon law and because it violates an existing Commission Order.¹¹ Qwest also objects to the Complainants’ Precautionary Motion to Allow Second Amendment to the Complaint (Precautionary Motion) for several reasons. First, Qwest objects to its inclusion of a claim for refund of CustomNet charges in violation of our order. Second, the Complainants have added additional claims unrelated to the refunds under the FCC’s payphone orders, thus expanding the scope of the proceeding.¹² Finally, Qwest notes with disapproval the bringing of claims on behalf of unidentified non-members,

⁸ *Id.* at 17-18.

⁹ Qwest Motion to Strike First Amended Complaint at 3-4.

¹⁰ *Id.* at 4-6.

¹¹ Qwest Motion to Strike Second Amended Complaint at 1, 5-7.

¹² *Id.* at 1-2, 7-14. Qwest asserts that one of the claims raises new factual and legal issues relating to the circumstances surrounding the FCC’s issuance of the Waiver Order in 1997: whether an affirmative claim for estoppel even exists and whether the alleged representations were actually made and is without foundation. Similarly, it asserts that the claim for refunds relating to the last Qwest general rate case is both baseless and beyond the scope of the proceeding, as are the claims for discrimination and “prohibited acts” for which NPCC asserts its members are entitled to relief under ORS 759.455. With respect to attorneys’ fees, Qwest notes that the statutes referred to by NPCC relate to costs of judicial review of agency orders by the Court of Appeals, not by the Commission.

asserting that NPCC lacks standing to bring such claims and that the Commission lacks authority to order refunds to such non-parties.¹³

C. NPCC's Reply

On December 22, 2009, NPCC filed a Reply to Qwest Motion to Strike Complainants' First Amended Complaint and Second Amended complaint (Reply). NPCC asserts that Qwest has made a number of pleading errors and "reveals its confusion as to the authority concerning any amendment before the PUC."¹⁴ After discussing the legal evolution of the amending process and the interaction of the Oregon Rules of Civil Procedure (ORCP) and the statutes and Commission Rules relative to such amendments, NPCC asserts:

Given a proper reading and application of ORCP 23, the newly added real parties in interest are entitled to the filing of not only the First Amended Complaint, but also the Second Amended Complaint by which they filed their first amendment under ORCP 23A. Following the addition of the "real parties in interest" they have only for the first time appeared by the filing of the First Amended Complaint * * * . Being named as a party gave them, for the first time, the right to appear on their own, to obtain a refund by a PUC order, and each had the right to file its own Complaint * * * . That amended filing was a matter of right * * * without the necessity of filing an additional motion to amend.¹⁵

NPCC contends that Qwest is incorrect in its assertion that the added parties are bound by prior pleadings; they are not because they have never been heard before and cannot be bound, having been a non-party at the time of the motion.

Furthermore, the assumptions as to the knowledge and complicity of the newly named Complainants in the motion by Qwest reaches far beyond its knowledge of the parties and their relationship to prior counsel and even the Motion to amend. It is clear that there was some kind of impasse in that earlier relationship or new counsel would not now be present. Suffice to provide that there was an unresolved conflict in direction which necessitated the substitution of new counsel, but that cannot tar nor bind the newly added Complainants * * * .¹⁶

NPCC next notes that since no economic relief could have been allowed or ordered until the addition of the real parties in interest, the case and the real parties' rights did not really commence until they entered the case and that they therefore may pursue all refunds regardless of their age or the completion and finality of prior dockets. "It would be a travesty for

¹³ *Id.* at 15-17.

¹⁴ Reply at 2.

¹⁵ *Id.* at 4-5.

¹⁶ *Id.* at 5-6.

the Commission to cut short the claims pled by a Complaint which claims could not have been (sic) pled prior to the completion of the over 8 year litigation to develop lawful rates in UT-125 in compliance with Federal law * * * the most of the claims alleged therein did not come into existence until November 15, 2007 when final NST compliant rates were adopted and made effective.”¹⁷

NPCC concludes that the law in Oregon is clearly to allow for a trial on the merits and that a pleading error is to be disregarded unless it affects a substantial right, under ORCP 12, and the amendment is to be liberally granted. Qwest has never filed an Answer or responded to the allegations of the Complaint, and this is the first opportunity they have had to bring their case and obtain reward from the Commission. The Commission granted prior counsel the right to file an Amended Complaint and, the First Amended Complaint was filed in the form as attached to that Motion. Now that the PSP payphone services have been established by UT 125, the Commission should allow the Complainants to proceed under the Second Amended Complaint.¹⁸

D. Analysis and Opinion

The history of this proceeding was recently summarized in our Order No. 09-155 and will not be repeated here. There we made it abundantly clear that the sole allowed purpose of an NPCC Amendment was to permit the NPCC member PSPs who would be subject to cross-examination by Qwest regarding PAL services and would receive any damages if awarded to become named parties to the proceeding. The February 26, 2009, Motion unequivocally stated at the time “The addition of the members to this case would not change the claim asserted, the discovery process or the amount being sought from Qwest. The NPCC members seek from Qwest the same relief that NPCC now seeks on its members’ behalf. There is no imaginable prejudice or disadvantage to Qwest.”¹⁹

In Order No. 09-155, we rejected the attempt by NPCC (and by extension based upon NPCC’s representation, any member PSP) to broaden the scope of the case by the inclusion of CustomNet services, as they did not relate back to the original claim.²⁰ Our finding that Qwest would not be prejudiced by our decision, *i.e.*, that its exposure to litigation of other issues or additional parties beyond those then represented by NPCC would not change, was explicitly set forth:

Qwest is not prejudiced because it knew or should have known that *these parties* were the most likely targets of its efforts at discovery and cross-examination; there is *no significance* in the timing of mentioning their names specifically as the parties; and the *amendment serves to clarify* the true parties with a pecuniary

¹⁷ *Id.* at 6-8.

¹⁸ *Id.* at 8-10.

¹⁹ Motion at 7.

²⁰ Order No. 09-155 at 7-8.

interest in and knowledge of the transactions that are the subject of the complaint.²¹

In both its First and Second Amended Complaints, NPCC and its member PSPs, collaterally attack our opinion in Order No. 09-155, essentially claiming that, with new plaintiffs, all prior rulings and orders are not binding. NPCC then recites the bases on which it believes CustomNet services, and a reopening of issues regarding rights to refunds based on the outcome in docket UT 125, are properly the subject of recovery by its member companies (and any others it might subsequently find along the way).

If that is indeed NPCC's view, it could and should have directly challenged Order No. 09-155, timely seeking either clarification, rehearing, or appeal. It did none of those. Instead, it attempts to identify differences between prior counsel and its clients as a reason why our previous decision should not apply, while failing to provide supporting facts for allegations of inadequate or improper representation of PSPs' interests by prior counsel as the basis for not binding the individual PSPs to our order. We find NPCC's position to be without merit.

The First Amended Complaint should be allowed solely to the extent that we join the entities listed in Exhibit A thereof as Complainants and allow the inclusion of allegations relative to PAL charges. Allegations and argument relative to any other services or charges should be stricken in all respects. The Precautionary Motion should be denied and the Second Amendment not accepted in the proceeding.

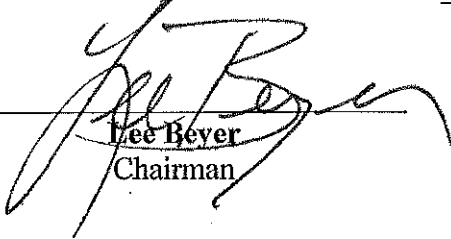
²¹ *Id.* at 10 (emphasis added.)

IV. ORDER

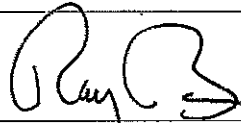
IT IS ORDERED that:

1. The First Amended Complaint is accepted with the following conditions:
 - A. The entities named in Exhibit A of the First Amended Complaint are made parties to the proceeding.
 - B. References to various services generally included under the description "CustomNet" are stricken from the First Amended Complaint.
 - C. The use of the term "Payphone Services" shall only mean Public Access Line services and references to any other services are stricken from the First Amended Complaint.
 - D. All references to docket UT 125 and the calculation of any refund claims thereunder are stricken from the First Amended Complaint.
2. The Precautionary Motion to Allow Second Amendment is denied. The Second Amended Complaint of NPCC *et al.* is not accepted.

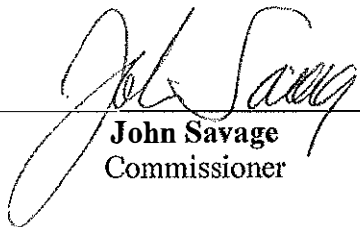
Made, entered and effective FEB 01 2010



Lee Beyer
Chairman



Ray Baum
Commissioner



John Savage
Commissioner



**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR 26/UC 600

THE NORTHWEST PUBLIC
COMMUNICATIONS COUNCIL,

Complainant,

v.

QWEST CORPORATION,

Defendant.

ORDER

DISPOSITION: MOTION FOR LEAVE TO AMEND COMPLAINT
DENIED IN PART AND GRANTED IN PART

I. INTRODUCTION

In this order, we deny the Motion of the Northwest Public Communications Council (NPCC) to amend its complaint by adding new claims against Qwest Corporation (Qwest) for refunds relating to the provision of "CustomNet" fraud prevention services. We find that granting the request to add the new claims would have (1) joined claims not sufficiently related to the subject matter of the initial complaint--Public Access Line (PAL) service--to relate back to it; and (2) violated the statute of limitation provisions applicable to the new claims that NPCC proposes to add to this proceeding.

We grant the motion to amend the complaint by adding 13 new plaintiffs. The parties proposed to be added by the amendment were the parties with the pecuniary interest in the original complaint, and the amendment serves to clarify the true parties with a pecuniary interest in and knowledge of the transactions that are the subject of the complaint. Therefore, Qwest is not prejudiced by their inclusion as parties-plaintiff.

II. PROCEDURAL HISTORY

By Order No. 05-208, entered May 3, 2005, the Public Utility Commission of Oregon (Commission) affirmed a ruling of the Administrative Law Judge (ALJ) holding this proceeding in abeyance pending a decision by the Federal Communications Commission (FCC) on certain petitions for declaratory ruling in CC Docket 96-128 due to "the fact

that the issues raised by parties in this case are currently pending before the FCC in the Consolidated Petition Proceeding.”¹ In affirming the ALJ’s Ruling, the Commission noted as follows:

[A] decision by this Commission interpreting the *Waiver Order* will not expedite the resolution of this dispute. Given the amounts at issue, it is virtually certain that any decision we reach will be appealed, a process that we agree may take years to conclude. After a decision by the Oregon appellate courts, it is equally certain that the losing party will petition the FCC to preempt the state court decision pursuant to Section 276(c) of the Telecommunications Act. Thus, in the end, the parties will find themselves in the same place as the petitioners in the Consolidated Petition Proceeding.²

On February 4, 2008, more than two-and-a-half years after the Commission issued its order, NPCC filed a Motion to Lift Order Holding Case in Abeyance and then, on March 18, 2008, withdrew the Motion in the belief—eventually proven to be mistaken—that the FCC would be acting in the near future.

Another year passed, and on January 14, 2009, NPCC filed a Motion to Lift Order Holding Case in Abeyance, asserting, at page 2, that it “had lost patience with the FCC,” but believed that recent cases in the Ninth and Tenth Circuit Courts of Appeal (Ninth and Tenth Circuit) were “controlling federal law that clarifies Qwest’s obligation under Section 276 of the Communications Act and should give the Commission more than a sufficient legal basis for determining the issues presented in this case.”

On January 28, 2009, Qwest filed a Response to NPCC’s Motion to Lift Order Holding Case in Abeyance. Qwest did not oppose the NPCC Motion, but took issue with NPCC’s characterization of Qwest’s positions in the case and the impact of the Ninth and Tenth circuit decisions.

A telephone prehearing conference was held in this case on Thursday, February 5, 2009. At the conference, the ALJ granted the NPCC Motion, and it was agreed that NPCC would file either a motion for leave to file an amended complaint or a stipulation agreeing to the filing of an amended complaint no later than February 26, 2009. NPCC timely filed its Motion for Leave to Amend Complaint and Amended Complaint of the Northwest Public Communications Council, *et al.* for Refunds of Payphone Services Overcharges (Motion) on February 26, 2009. On March 13, 2009, Qwest Corporation’s Response to NPCC’s Motion for Leave to Amend Complaint (Response) was filed. NPCC filed a Reply in Support of Complainant’s Motion for Leave to Amend Complaint (Reply) on March 30, 2009.

¹ Order, at 1-2.

² *Id.*, at 2-3.

III. DISCUSSION

A. NPCC Motion

1. *Parties' Positions*

a. NPCC

NPCC, a trade association, seeks refunds for alleged overcharges by Qwest for services provided to NPCC's member companies. The original NPCC Complaint alleges that Qwest charged PAL rates in excess of amounts due under Section 276 and the FCC's new services test. The original NPCC Complaint did not provide a specific dollar amount of the alleged overcharges because, NPCC now asserts, it asked the Commission to include the disparity in rates for a fraud prevention service known as "CustomNet" established in a separate rate case proceeding then pending in Docket UT-125.³

NPCC seeks to amend its original complaint in two ways. First, it seeks inclusion of allegations relative to CustomNet charges in the complaint proceeding. NPCC claims that these separate charges arise out of the same behavior and seek the same type of relief for the same parties. "The CustomNet claim is just an outgrowth of the original case, which is brought about by the fact that the CustomNet claims became ripe to assert in 2007." The CustomNet claims could only be asserted once the rate case was concluded by the November 2007 settlement.⁴ NPCC claims that Qwest will not be prejudiced or disadvantaged because the original case had been held in abeyance until a month ago, and "[i]t would have been improper for NPCC to attempt to amend its Complaint while the case was held in abeyance and prior to the end of the Rate Case. The Parties have not completed presentation of evidence * * *. NPCC's request to amend the complaint to include the CustomNet claim is within the statute of limitations because the claim accrued in November 2007, at the time of the Final Order approving the CustomNet rates."⁵

Second, NPCC seeks inclusion of additional plaintiffs. NPCC asserts that Oregon Revised Code of Civil Procedure (ORCP) 30 permits the addition of the members to the case because the law and facts are identical to both NPCC and its members and would not change the claims asserted or the discovery process and thus "[t]here is no imaginable prejudice or disadvantage to Qwest * * *. Even if this amendment raised statute of limitations issues * * * under ORCP 23, Oregon courts permit a complaint to be amended to substitute in a proper party as the party plaintiff even if the statute of limitations has run, thus allowing the substitute plaintiff to bring an original action against defendant."⁶

³ Motion, at 2.

⁴ *Id.* at 4-6.

⁵ *Id.* at 6.

⁶ *Id.* at 7.

b. Qwest

Qwest, in its introductory summary, contends that the Motion should be denied because (1) the new claims would change the nature of the current case; (2) Qwest would be prejudiced by the amendment; and (3) the claims lack merit because they are barred by the two-year statute of limitations: the 13 proposed new complainants' rights accrued in 1997 and are being brought for the first time 12 years later.⁷ Qwest also notes the failure of NPCC to distinguish between adding, versus substituting, complainants and the legal infirmities associated with the inclusion of CustomNet services in the amended complaint.⁸

With regard to new plaintiffs, Qwest contends that ORCP 23 does not apply to the addition of new plaintiffs because the relation back provision clearly applies to amending the complaint by adding new defendants, not plaintiffs. "It also establishes when an existing party's amended complaint relates back for statute of limitations purposes, again including when an amended complaint adds a new defendant." Qwest contends that ORCP 30—Misjoinder and nonjoinder of parties—is the appropriate section.⁹ Even if ORCP 23 does apply, Qwest provides four factors for the Commission to consider when exercising its discretion regarding allowing an amendment: (1) the proposed amendment's nature and relationship to the existing pleadings, (2) prejudice to the opposing party, (3) timing, and (4) the merit of the proposed amendment.¹⁰

Qwest next argues that the Commission should deny the amendment to add 13 new complainants because it drastically changes the nature of the case, requiring it to defend against the claims of 13 additional parties and increasing the amount of discovery. Furthermore, "[a]dditional discovery may be required as to when each of the complainants was or should have been aware of its potential claims against Qwest* * *."¹¹ Qwest also claims that it would be prejudiced because, if the case is expanded, there is a likelihood that meaningful discovery from the new parties might no longer be available because NPCC has admitted that some member companies' records may be unretrievable and does not assert that the individual complainants would suffer any prejudice if they are not added to the proceeding.¹²

Qwest next contends that the refund claims are barred by the two-year statute of limitations set out under 47 U.S.C. §415(b) which covers complaints against carriers for refunds and argues that the claims must be brought within two years of the claim's accrual. Since the claims are based solely upon federal requirements in an FCC order, the federal statute of limitations applies.¹³ Where claims are based on allegations that Qwest's PAL rates effective April 15, 1997, did not comply with the new services test, the Commission has ruled that a claim accrues "when a plaintiff knows or has reason to know of the harm or injury that is the basis of the cause of action." Other providers of payphone services, some

⁷ Response, at 1.

⁸ *Id.*, at 2.

⁹ *Id.*, at 3.

¹⁰ *Id.*, at 4, citing *Forsi v. Hildahl*, 194 Or 667 (1974).

¹¹ *Id.*, at 4-5.

¹² *Id.*

¹³ *Id.*, at 6 and cases cited therein.

represented by NPCC's counsel, filed timely complaints, undercutting NPCC's arguments for allowing amendment in this case.¹⁴ Qwest asserts that NPCC's reliance on various cited cases relate to substitution, not addition, of parties and thus does not support its argument. Furthermore, the new complainants' claims are materially different from the original claims, changing the substance of the complaint and increasing the damages. They therefore do not "relate back" to the original complaint. The claims would also be untimely in any event, being subject to the two-year statute of limitations.¹⁵

Qwest next addresses NPCC's proposed addition of claims for refunds of CustomNet Charges. Although subject to the same rate-setting standards as PAL services, Qwest contends that CustomNet is subject to significantly different procedural requirements: whereas the FCC required ILECs to file PAL rates with state commissions, it required ILECs to file CustomNet rates with the FCC itself. "[T]he only rates potentially subject to return under the FCC's Waiver Order—the basis of NPCC's current claim—are PAL rates; NPCC's claim that Qwest must also refund a portion of CustomNet charges is not based on the Waiver Order. Rather, it appears to be based directly on Section 276 of the Telecommunications Act."¹⁶

Using the first factor in the *Forsi* case, Qwest argues that the addition of a claim for refunds of CustomNet charges would substantially change the nature of the case, adding new elements of damages not at issue for the almost eight years that the case has been pending. Applying the second and third factors in *Forsi*, Qwest argues that it would be prejudiced because it would require discovery on new issues and raise the specter of unavailable information, hampering Qwest's ability to mount a defense against the new claims. Finally, Qwest claims a bar to the action by the statute of limitations.¹⁷

c. NPCC Reply

NPCC replies that there will be no material impact upon Qwest by adding the NPCC members as named complainants because, as Qwest knows, NPCC has always acted on behalf of its members. Therefore, discovery, claims, and damages theories would be the same. Furthermore, CustomNet and PAL involve discovery of the same telephone bills and the same type of relief—refund of excessive charges—applies to both services. Qwest has not been surprised because in 2005 NPCC put Qwest on notice that it would be adding CustomNet services to the complaint.¹⁸

NPCC asserts that ORCP 23 A, buttressed by the *Forsi* case, provides that in administrative cases pleadings are liberally construed and easily amended and that based on the four factors in the *Safeport*¹⁹ case, the NPCC motion should be granted.²⁰ Specifically, NPCC asserts that Qwest will not be prejudiced by the amendment. First, the addition of the

¹⁴ *Id.*, at 6-8 and cases cited therein.

¹⁵ *Id.*, at 8-9 and cases cited therein.

¹⁶ *Id.*, at 9.

¹⁷ *Id.*, at 10-11 and cases cited therein.

¹⁸ Reply, at 1-2.

¹⁹ *Safeport, Inc. v. Equipment Roundup & Mfg.*, 184 Or 690, 699 (2002).

²⁰ Reply, at 2.

claimants will not increase Qwest's burden; there will be only one legal brief, no greater number of invoices, and the same parties will be deposed whether the motion is granted or not. Both CustomNet and PAL involve Section 276 of the Communications Act of 1996 and related case law. Both services also have identical parties, identical Qwest actions, and identical relief and evidence, because CustomNet and PAL charges are on the same bills.²¹

Second, NPCC claims that, even though the case is eight years old, the case is just getting started; there has been no discovery or even an answer to the original complaint and thus timeliness is not a material issue. The Complaint only became ripe in 2007, at the conclusion of the rate case, and Qwest has been on notice of NPCC's intentions. Without prejudice to the defendant, the lateness issue is moot.²²

Third, NPCC contends the amendment meets the requirement that it be closely related to the original complaint because "[t]he law and facts at issue in this case are identical whether the complaint is amended or not * * *."²³ Finally, the "colorable merit" standard has, in NPCC's view, also been met by the CustomNet overcharge allegations.²⁴

NPCC cites ORCP 23 C permitting amendments arising out of the same conduct, transaction, or occurrence as the original complaint, in which case the amendment relates back to the original complaint. An amendment filed after the statute of limitations period has past may relate back "if the defendant would have been able to discern from the earlier pleading a potential for the additional basis of liability." NPCC claims the CustomNet claims arise from the same facts as the PAL claim and is based on the same legal theories.²⁵ NPCC also asserts that Qwest misapplies the time period by which the statute of limitations should be calculated, claiming that the time period under 28 U.S.C. §1658 (a) is four years and not two.²⁶ NPCC closes its Reply with the assertion that Qwest is concocting legal barriers to the amendment without a proper basis in law by referring to ORCP 23 and ORCP 30 which Qwest interprets as only allowing the addition of defendants, not complainants. NPCC claims that it is "just" to allow the NPCC members to become parties and to add CustomNet, when doing so creates no prejudice to Qwest and involves the same facts and law as the original complaint."²⁷

IV. ANALYSIS AND OPINION

A. Addition of New Claims

In discussing the Commission's role in resolving the issues in the original complaint, the presiding ALJ stated:

²¹ *Id.*, at 2-3.

²² *Id.*, at 3-5 and cases cited therein.

²³ *Id.*, at 5.

²⁴ *Id.*

²⁵ *Id.*, at 5-6.

²⁶ *Id.*, at 6-7 and cases cited therein.

²⁷ *Id.*, at 7.

The threshold question presented in this proceeding concerns *the scope of the refund obligation contemplated by the FCC's Payphone Orders* * * *. Since the RBOCs' refund liability under the *Payphone Orders* is ultimately a question of federal law, it makes sense to allow the FCC the opportunity to provide guidance to the states concerning the proper interpretation of those orders. While this Commission could certainly opine on what the FCC intended in its *Payphone Orders*, the FCC itself is in the best position to articulate what its decisions require. * * * In my view, it makes little sense to expend time and resources litigating this matter before the OPUC and state courts when it is unlikely to produce a final outcome, especially when the identical issues are pending before the FCC. * * * any potential RBOC financial exposure will remain until the federal proceedings are finally resolved.²⁸

More than four years later, the FCC has yet to issue its Order in response to the requests for a declaratory ruling. Although the ALJ's comments remain as true today as they were in 2005, NPCC now seeks to *broaden the scope* of the case to encompass a service, CustomNet, which may or may not be subject to the same set of issues and intentions regarding refund obligations as are set forth in the *Payphone Orders*. Although NPCC asserts that its claims for CustomNet service overcharges arise out of the same legal theories as for PAL services, without a definitive statement from the FCC that services such as CustomNet were within the scope of the original proceeding, we are not so certain. Indeed, by pursuing CustomNet, we run the risk of obfuscating what is already an uncertain undertaking and raising the possibility that the issuance of an FCC order would not resolve the original complaint because the amendment had added CustomNet services. Thus, we would defeat the very purpose of lifting the abeyance ruling—providing the parties with a definitive Order addressing the issues in the original complaint.

ORS 756.500(4) gives the Commission the authority to order the amendment of a complaint before the completion of taking of evidence. ORCP 23 A provides, in pertinent part, that “a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” ORCP 23 C. Relation back of amendments states, in pertinent part, “Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the original date of the pleading.”

According to NPCC, CustomNet charges were on the very same invoices from the PAL charges about which it originally complained. Nevertheless, NPCC's initial complaint was narrow and explicit. Even though CustomNet charges were ostensibly listed on the invoices and could have been challenged at the time, NPCC made no *general* allegations of overcharging by Qwest (which might therefore have encompassed CustomNet), but took pains to confine the “new services test” to PAL rates, although NPCC now claims that the same

²⁸ ALJ Ruling at 7-8 (Mar. 23, 2005) (emphasis added).

legal theories as in the PAL case apply to CustomNet. Furthermore, based upon NPCC's representations, we find that CustomNet service purchases were severable from PAL services, that they viewed them as such and thus do not arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." The CustomNet claims which NPCC seeks to add to the case via amendment thus do not "relate back" under ORCP 23 C.

In light of our findings that the CustomNet claims do not relate back to the original complaint, we are faced with the question of the applicability of the statute of limitations in barring the amendment. Even if we were of the view that, under ORCP 23, justice should require amending the complaint, we find that the most recent relevant case law unequivocally concluded that the applicable statute of limitations of two years poses an absolute bar to the addition of CustomNet services to the instant case.²⁹

For all of the aforementioned reasons, we decline to allow NPCC to amend the complaint by the addition of claims for CustomNet services.

B. Addition of New Plaintiffs

Litigation undertaken by a trade association on behalf of its members and seeking monetary compensation from a single defendant is a common occurrence. The defendant is aware that discovery and examination of witnesses will likely encompass not the trade association's executives or counsel, but the association's aggrieved constituent members.

In this instance, Qwest would be expected to seek discovery on the members, as they were the customers who received PAL services, paid Qwest, had correspondence relating to their knowledge and awareness of the FCC litigation and would be seeking refunds, if NPCC prevailed on the merits. Qwest was on notice that the individual companies and not their umbrella organization were the true parties in interest with respect to the funds at stake.

Furthermore, Qwest never objected to the Commission that NPCC lacked any standing to bring the complaint, even though NPCC itself would not be eligible to receive any refunds. By adding specific members to the claim, NPCC's case is not bolstered nor is Qwest's burden increased. There is only an objective acknowledgement of the already-known parties with a pecuniary interest in the outcome of the litigation. We find that the parties may be added under the four tests of the *Forsi* case: (1) the proposed amendment's nature and relationship to the existing pleadings, (2) prejudice to the opposing party, (3) timing, and (4) the merit of the proposed amendment. The parties proposed to be added by the amendment were the parties with the pecuniary interest in the original complaint;

²⁹ *Davel Communications, Inc., v. Qwest Corporation*, 460 F.3d 1075, 1089 (9th Cir. 2006), applied the two-year statute of limitations to a claim for refund for CustomNet-like fraud protection rates. The court rejected the argument that the claim did not accrue until Qwest filed new services test-compliant rates in 2003, holding that the plaintiff's claim accrued in 1997, when Qwest was required to file compliant rates. 460 F.3d at 1092. The court found that refunds could only be claimed for the two-year period prior to filing the complaint.

Qwest is not prejudiced because it knew or should have known that these parties were the most likely targets of its efforts at discovery and cross-examination; there is no significance in the timing of mentioning their names specifically as the parties; and the amendment serves to clarify the true parties with a pecuniary interest in and knowledge of the transactions that are the subject of the complaint. Therefore, Qwest is not prejudiced by their inclusion as parties-plaintiff.

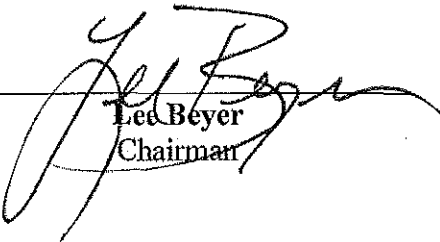
ORDER


IT IS ORDERED that:

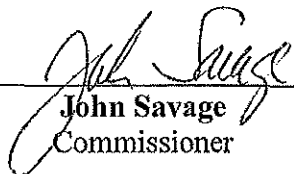
1. The Motion for Leave to Amend Complaint with respect to the addition of new claims filed by the Northwest Public Communications Council is denied.
2. The Motion for Leave to Amend Complaint with respect to the addition of new plaintiffs filed by the Northwest Public Communications Council is granted.

MAY 04 2009

Made, entered and effective _____


Lee Beyer
Chairman


Ray Baum
Commissioner


John Savage
Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.

THE NORTHWEST PUBLIC
COMMUNICATIONS COUNCIL, PSPs A to
Z; and NPCC members: Central Telephone,
Inc.; et al.,

Petitioner,

v.

Qwest Corporation; the Oregon Public
Utilities Commission and Stephen Bloom,
Susan Ackerman and John Savage, in their
capacity as Commissioners,

Respondent.

Oregon Public Utility Commission
Docket No. DR 26 / UC 600

CA No. A _____

**PETITION FOR JUDICIAL REVIEW
OF A STATE AGENCY FINAL
ORDER AND INTERIM ORDERS**

SUPPLEMENTAL CERTIFICATE OF SERVICE

I, the undersigned below, hereby certify that the foregoing PETITION FOR JUDICIAL REVIEW of A State Agency Order and Exhibits and this SUPPLEMENTAL CERTIFICATE OF SERVICE was served on all party representatives included in the official service list for the proceedings as below indicated:

Lawrence Reichman
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by the following indicated method or methods:

 X by **mailing** a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Portland, OR, and by electronic mail to the above denote e-mail address on the date set forth below.

And Certify that I did electronically file same with the PUC Filing Center, with a hard copy to PUC, Filing Center, 550 Capitol Street NE, Ste 215, PO Box 2148, Salem, OR 97308-2148.

DATED this Feb 10, 2012

/s/ Frank G. Patrick
Frank G. Patrick, OSB 76022
Attorney for NPCC et al